LIBRARY
SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1055, 73-1069, 73-1070, 73-1071, 73-1072

BOWMAN TRANSPORTATION, INC.; JOHNSON MOTOR LINES, INC.; RED BALL MOTOR FREIGHT, INC.; LORCH-WESTWAY CORPORATION, et al.; UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,

Appellees/Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

PETITION FOR REHEARING

DON A. SMITH
THOMAS HARPER
P.O. Box 43
Fort Smith, Arkansas 72901
WENTWORTH E. GRIFFIN
FRANK W. TAYLOR, JR.
1221 Baltimore Avenue
Kansas City, Missouri 64105
WILLIAM O. TURNEY
J. WILLIAM CAIN, JR.
2001 Massachusetts Ave., N.W.
Washington, D.C. 20036
DREW L. CARRAWAY
1111 E Street, N.W.
Washington, D.C. 20004
PHINEAS STEVENS
P.O. Box 22567
Jackson, Mississippi 39205
PHILLIP ROBINSON
P.O. Box 2207
Austin, Texas 78767
M. WARD BAILEY
2412 Continental Life Building
Fort Worth, Texas 76102

Counsel for Appellees/Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1055, 73-1069, 73-1070, 73-1071, 73-1072

BOWMAN TRANSPORTATION, INC.; JOHNSON MOTOR LINES, INC.; RED BALL MOTOR FREIGHT, INC.; LORCH-WESTWAY CORPORATION, et al.; UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,

Appellees/Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

PETITION FOR REHEARING

INTRODUCTION

This Petition for Rehearing is submitted jointly on behalf of all appellees/petitioners.[1] Mr. Justice Blackmun by order dated January 9, 1975, extended the time

1. Arkansas-Best Freight System, Inc.; Mercury Motors, Incorporated; Alamo Express, Inc.; Braswell Motor Freight Line, Inc.; Campbell Sixty-Six Express, Inc.; Central Freight Lines, Inc.; ET&WNC Transportation Company; Eagle Motor Lines, Inc.; Gordons Transports, Inc.; Holloway Motor Express, Inc.; Mercury Freight Lines, Inc.; Red Arrow Freight Lines, Inc.; Red Line Transfer & Storage Company, Inc.; T.I.M.E.-DC, Inc.; Transcon Lines; Yellow Freight System, Inc.; Roadway Express, Inc.; and Jack Cole-Dixie Highway Company.

for filing this petition to and including February 3, 1975. Petitioners respectfully pray that this Court grant this Petition for Rehearing and that this case be set down for reargument; or alternatively, that this case be remanded to the District Court for a determination of the substantiality *vel non* of the evidence.

This case is an appeal from a three-judge District Court which set aside and permanently enjoined an order of the Interstate Commerce Commission. The District Court held that the Commission's order was founded upon findings *and conclusions* that were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under §10(e) of the Administrative Procedure Act, 5 USC §706. Appellants contended here that the District Court erred in failing to apply the only test that could be properly applied by the District Court, that is, the substantial evidence test of §706(2)(E). Appellees/petitioners asserted that though the substantial evidence test was applicable, the arbitrary and capricious standard of §706 (2)(A) best described the errors committed by the Commission and that the latter test was properly applied by the District Court.

On December 23, 1974, this Court reversed the judgment of the District Court, holding that the Commission had not been in violation of the arbitrary and capricious standard. 43 U.S.L.W. 4091. The substantial evidence question was not reached because the Court felt that appellees had conceded that the findings "*and conclusions*" of the Commission were supported by substantial evidence.

Petitioners respectfully submit that the Court erred in stating that appellees petitioners made such a concession. This error appears twice in the opinion. Early in the opinion it was stated that:

> "The District Court properly concluded that, though an agency's finding may be supported by substantial evidence, based on the definition in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (footnote omitted), it may nonetheless reflect arbitrary and capricious action. *There seems, however, to be agreement that the findings and conclusions of the Commission are supported by substantial evidence.* The question remains whether, as the District Court held, the Commission's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' as provided in §10(e)(B)." 43 U.S.L.W. 4092 (Slip Opinion, at 3) (Emphasis added).

That the Court felt this "agreement" abrogated the need for any ruling on the substantiality of the evidence was further discussed by the Court at the end of its opinion. There the Court stated, in note 11:

> "At oral argument counsel for appellees *disposed* of any 'substantial evidence' objections to the Commission's order by conceding that 'we do not allege that any finding of fact is not supported by substantial evidence.' Tr. of Oral Arg. 25." 43 U.S.L.W. 4097 (Slip Opinion, at 17) (Emphasis added).

Petitioners respectfully submit that there was no concession that substantial evidence supported the order and further submit that the substantial evidence issue has never been ruled upon by either the District Court or by this Court. In addition, petitioners would respectfully suggest that the Court's view that appellees/petitioners felt there was substantial evidence doubtless flavored the Court's decision that the District Court erred in ruling that the Commission's action violated the arbitrary and capricious standard.

I.

There Was No Concession at Oral Argument That the Commission Order Was Supported by Substantial Evidence.

Appellees have never contended that the agency's findings of *fact* were incorrect. On the contrary, all factual issues were settled by the hearing examiners. The facts of record, as set forth in their report, have never been challenged by any party. Accordingly, all parties recognize that the recitals of *facts* in the agency's report are supported by substantial evidence. However, appellees have consistently maintained, on brief and at oral argument, that the actions and conclusions based upon such facts *were not supported by substantial evidence.* Section 706 states that if *either actions or conclusions* are found, *inter alia,* to be either arbitrary or capricious or unsupported by substantial evidence such agency action is to be set aside. Counsel for appellees made a clear distinction between *findings* and *conclusions.*

That the findings or recitals of *fact* are supported by substantial evidence does not mean that the *actions* and *conclusions* based upon those findings are supported by substantial evidence. Findings of fact and actions and conclusions based upon such findings are quite different matters. This statutory distinction was made by the District Court, *e.g.,* App. II, at 1308-1309, and at 1316-1317. Such a distinction was also made by counsel for the Government when he referred at oral argument to the ultimate conclusions and subordinate findings of the Commission. Tr. of Oral Arg. 7.

Petitioners suggest that the Court felt that petitioners made the concession in issue because of a misconstruction of the following statement of counsel for appellees/petitioners:

> "The findings of fact are not in issue. They have never been in issue. So we did not allege that any finding of fact *itself* was not supported by substantial evidence. We alleged that the treatment of these findings, the conclusions drawn from the findings lack the rational basis, they were arbitrary, they were capricious, they have constituted an abuse of discretion." Tr. of Oral Arg. 25 (Emphasis added).

Counsel was not conceding that there was substantial evidence. This is amply demonstrated by his subsequent statement that the facts were not in dispute; in dispute were the actions and conclusions drawn from those facts. Tr. of Oral Arg. 26. Necessarily, such conclusions apply both to the substantial evidence test as well as to the arbitrary and capricious test. Counsel went on to state that while the substantial evidence test certainly applied, the test best describing the error committed in this case was the arbitrary and capricious standard. He then stated that the District Court "could have reached every conclusion that it reached in terms of the substantial evidence rule." Tr. of Oral Arg. 27.

That there was no concession of substantial evidence is clearly demonstrated by the response of counsel to the following question:

> "If we disagree with the district court in terms of arbitrary—either disagree with it that it's applicable at all, the arbitrary and capricious test, or that even if it is there was nothing arbitrary and capricious about this order, the case is over as far as you are concerned." Tr. of Oral Arg. 27.

Counsel answered:

> "Not at all, your Honor. I would say that every finding or conclusion of the lower court could have

been expressed in terms of lack of substantial evidence." Tr. of Oral Arg. 27.

Furthermore, in response to extensive questioning of whether there was substantial evidence of need in the record, it was repeatedly stated that there was not. See Tr. of Oral Arg., at 27-30.

Appellants were well aware that notwithstanding the District Court's ruling on the arbitrary and capricious standard, the question of substantial evidence still remained. This is amply demonstrated by appellants' argument throughout that the substantial evidence standard was the only test that should have been applied to this case. See, *e.g.*, Tr. of Oral Arg., at 8, 20. See also Tr. of Oral Arg., at 9, where the Government argued that the District Court failed to "apply the substantial evidence test in this case." And see Tr. of Oral Arg., at 11, where the Government requested the Court to rule upon whether or not there was substantial evidence, rather than remand to the District Court to make that determination. The main statement in this respect appears in the Transcript of Oral Argument, at 12, where the question was asked:

> "Technically, you think then it would not be acceptable just to say the issue of substantial evidence isn't in the case. And then we either have to remand to determine it or determine it ourselves."

Counsel for the Government replied:

> "I believe that is correct, Mr. Justice White."

That the substantial evidence question had to be dealt with appears in the statement of a member of the Court that "a district court does have to make up its own mind as to whether there is substantial evidence, I suppose." Tr. of Oral Arg. 19. See also, Tr. of Oral Arg., at 20, where

a member of the Court noted that "[the district court has] got to decide whether [the evidence is] substantial."

Clearly, counsel for appellees made no concession that the Commission action was supported by substantial evidence. Moreover, such a concession would have clearly been at odds with the consistent position taken by appellees in the District Court and in their Brief in this Court. For example, at 9 of their brief, appellees/petitioners stated that "[i]n reaching its conclusions, the reviewing court did *not* find the actions and conclusions of the agency to be supported by substantial evidence . . . ."

II.

The Substantiality Vel Non of the Evidence Remains to Be Ruled Upon.

In its Opinion the District Court noted that the appellants here urged it "to confine its review to a determination of the substantiality" of the evidence. App. II, at 1309. Appellants sought to do the same in this Court and argued that the agency action was supported by substantial evidence. See, *e.g.*, Brief for Government, at 10, 11, 22-29; Brief for Private Appellants, at 14, 19, 30; Reply Brief for Private Appellants, at 14.

The question of whether or not the Commission order is supported by substantial evidence remains to be ruled upon. Because this Court felt appellees/petitioners at oral argument conceded the substantiality of the evidence, this Court stated that such a concession "disposed" of any need to reach this issue. No such concession was made, and thus the issue remains.

III.

This Case Should Be Set Down for Reargument, or in the Alternative, Should Be Remanded to the District Court for a Determination of Whether or Not the the Agency Action Is Supported by Substantial Evidence.

In light of the concession this Court felt appellees made, it was obviously easier for this Court to rule that the agency action involved in this case was not arbitrary or capricious. Therefore, because there was no concession, this case should be set down for reargument.

Alternatively, should this Court not desire reargument, this case should be remanded to the District Court for that court to rule upon whether or not the agency order was supported by substantial evidence.

CONCLUSION

This Petition for Rehearing should be granted, and this case set down for reargument; or alternatively, this case should be remanded to the District Court for a determination of whether the Commission's order is supported by substantial evidence.

Respectfully submitted,

DON A. SMITH
THOMAS HARPER
P.O. Box 43
Fort Smith, Arkansas 72901
WENTWORTH E. GRIFFIN
FRANK W. TAYLOR, JR.
1221 Baltimore Avenue
Kansas City, Missouri 64105
WILLIAM O. TURNEY
J. WILLIAM CAIN, JR.
2001 Massachusetts Ave., N.W.
Washington, D.C. 20036
DREW L. CARRAWAY
1111 E Street, N.W.
Washington, D.C. 20004
PHINEAS STEVENS
P.O. Box 22567
Jackson, Mississippi 39205
PHILLIP ROBINSON
P.O. Box 2207
Austin, Texas 78767
M. WARD BAILEY
2412 Continental Life Building
Fort Worth, Texas 76102

Counsel for Appellees/Petitioners

CERTIFICATE OF COUNSEL

I certify that this Petition is presented in good faith and not for delay.

FRANK W. TAYLOR, JR.
Counsel for Appellees/Petitioners

February, 1975